IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

JESSIE A. KILPATRICK,

Respondent.

No. 73

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

L. M. PARKER,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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June 4, 1948

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Texas & Pacific Railway Company, defendant in the above actions, respectfully prays for the issuance of writs of certiorari to the United States Circuit

Court of Appeals for the Second Circuit to review judgments of that Court, entered March 4, 1948, reversing judgments of the United States District Court for the Southern District of New York, entered December 12, 1947, which vacated service of process and dismissed these actions on the ground that at the time of their commencement the defendant, a foreign corporation, was not doing business within the Southern District of New York.

SUMMARY STATEMENT OF MATTER INVOLVED

Principal Question Passed on by Lower Courts

The principal question passed on by the District Court and by the Circuit Court of Appeals was whether The Texas & Pacific Railway Company was doing business within the Southern District of New York at the time of the commencement of these actions in December 1946.

Decision by District Court

The District Court (Caffey, *D. J.*), relying upon decisions by this Court, held that the defendant was not doing business of such a character as to subject it as a foreign corporation to service of process in the Southern District of New York, since the only business conducted by the defendant in that District was the solicitation of freight and passenger business (R. 152-159*; reported at 72 F. Supp. 635).

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* All references in this Petition and in the accompanying Brief to the Record are to printed page numbers thereof, unless otherwise indicated.

Decision by Circuit Court of Appeals

The Circuit Court of Appeals (L. Hand, Swan and Frank, *C. JJ.*) reversed the judgment of the District Court, holding that under the new explanation of corporate "presence" enunciated by this Court in *International Shoe Company* v. *State of Washington*, 326 U. S. 310 (1945), the continuous solicitation of business alone constituted "doing business" and that the test for determining corporate "presence" stated by this Court in the *International Shoe* case, namely, balancing the conflicting interests involved, never could be resolved in favor of a foreign railroad corporation sued under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60) because considerations of *forum non conveniens* have been unconditionally eliminated from suits brought under that Act (R. 174-182; reported at 166 F. [2d] 788).

Summary of the Facts

The facts upon which the District Court and the Circuit Court of Appeals rendered their decisions are wholly undisputed (R. 156). These facts are concisely summarized in the opinion of the District Court (R. 153-156).

The actions in both cases arose out of accidents which occurred in 1946 at the defendant's yards in Big Spring, Texas. The plaintiffs in both cases, employees of the defendant, resided in Big Spring, Texas, at the time the accidents occurred and at the time the actions were commenced. Both actions were commenced in the Southern District of New York in December 1946 (R. 6, 14, 25-26).

The defendant is a citizen of the State of Texas, operates a railroad in the States of Texas, Louisiana and Arkansas only and maintains its principal office at Dallas, Texas. At the defendant's office in Dallas its principal business

operations are carried on; here its books and records are kept, here its stockholders' and directors' meetings are held and from this office all of its corporate and fiscal business is conducted, such as mailing of checks, paying of bills, purchasing of equipment, etc. The defendant's bank account is maintained in Dallas, Texas (R. 27).

The defendant maintains a single office, consisting of two rooms, at 233 Broadway, New York City, where eight persons are employed. The lease for this office was executed by an officer of the defendant in Dallas, no one in New York being authorized to execute such a lease. The New York office is listed in the Manhattan telephone directory and has on its door "The Texas and Pacific Railway Company, Freight & Passenger Dept." The expenses of this office, including the salaries of the eight persons employed there, are paid by check from Dallas, Texas (R. 28).

The defendant's New York office has nothing to do with stockholders' notices, dividend checks or stock transfers. No one at this office has authority to issue original bills of lading for shipments on the defendant's lines and no such original bills of lading are issued from the defendant's New York office. No one at this office is authorized to issue passenger tickets over the defendant's lines and no such passenger tickets are issued from the defendant's New York office. No one at this office is authorized to make any other contracts on behalf of the defendant and no such contracts are made at the defendant's New York office (R. 28).

The sole purpose of maintaining the defendant's New York office is the solicitation of passenger and freight business over the defendant's lines which are maintained in the States of Texas, Louisiana and Arkansas. Any such business which successfully is solicited by the defendant's New

York office, actually is sold by the railroad over which the passenger or freight trip is scheduled to commence and all payments for such passenger or freight business are made to the railroad over whose lines the trip is scheduled to commence (R. 29).

With respect to passenger traffic, employees of the defendant in New York facilitate the procurement for prospective passengers, if they so desire, of through tickets to any point on or beyond the defendant's lines; in such instances the initial carrier issues the whole ticket, a part of which covers transportation over the defendant's lines. This is done through the Consolidated Ticket Office in New York City which is maintained jointly by several metropolitan railroads, not including the defendant. Each such railroad has there its own space and its own agent. The defendant has no space or employee there. The agents of the railroads which have space at this office sell through passenger transportation to any point in the country, the initial carrier issuing the whole ticket. One coupon of such a ticket providing, for example, for transportation over the Pennsylvania Railroad to St. Louis and thence to El Paso on the defendant's lines, would cover transportation on the defendant's lines from Texarkana to El Paso. Such a ticket is not issued by the defendant nor is any money turned over to the defendant in New York as the result of such a sale. Such sales are reported by the particular railroad selling such a ticket containing such a coupon to its auditing office. At the end of each month the aggregate sales by that railroad of tickets containing coupons for transportation over the defendant's lines are compared with the aggregate sales by the defendant of tickets containing coupons for transportation over that railroad's lines and a debit or credit balance, as the case may be, is struck. The actual transfer of funds in

settlement of such balances is handled through the general accounting offices of the two railroads, nothing whatever being done by the defendant in New York City with reference to these matters (R. 80-81, 82-83).

Certain fiscal activities of the defendant are carried on in New York City through such fiscal agents as J. P. Morgan & Co. Incorporated, Chemical Bank & Trust Company, Bankers Trust Company and The New York Trust Company. These fiscal agents serve only as registrars or trustees of the defendant's bonds or equipment trust certificates, interest disbursing agents thereof, stock transfer agents, or dividend disbursing agents on the defendant's stock (R. 96-103).

No employee of the defendant in New York has authority to approve, adjust or negotiate the settlement of any claim against the defendant by a shipper, a passenger or any other person. All negotiations and decisions as to the terms of settlement of claims are made by the defendant's officers in Texas and all checks in settlement of claims are issued by the defendant in Texas (R. 29).

The defendant does not own, lease or operate any lines of railroad in the State of New York. No meetings of its stockholders, directors or officers are held in New York. The defendant has never applied for or received a license from the Secretary of State of New York to do business there, nor has it designated an agent to receive process there, nor has it consented to be sued there (R. 27).

Previous Decision by Circuit Court of Appeals in Barnett *Case on this Question*

The Circuit Court of Appeals for the Second Circuit, about three and a half years prior to its decision in the

instant case, had held in *Barnett* v. *Texas & Pacific Railway Company,* 145 F. (2d) 800 (C. C. A. 2nd, 1944), that the defendant was doing business in the Southern District of New York upon the basis of a record substantially the same as that in the instant case, with three vital exceptions; the Circuit Court of Appeals found in the *Barnett* case that the defendant, in addition to maintaining a soliciting office in New York, (1) was actually selling tickets for transportation on its own lines, (2) was issuing bills of lading in New York and (3) was handling complaints. Upon that record, the Circuit Court of Appeals held that the defendant was doing business in New York at the time of the commencement of that action, where jurisdiction was based upon diversity of citizenship.

It is undisputed in the instant case that those three phases of activity by the defendant in New York were discontinued approximately three months after the decision by the Circuit Court of Appeals in the *Barnett* case for the deliberate purpose of enabling the defendant to conduct its business in New York in such a manner as not to be amenable to service of process there and that the defendant was not engaged in those activities at the time the instant actions were commenced (R. 29-31, 156-157). The District Court in the instant case held that the defendant, though once held to have been doing business in the Southern District of New York by reason of certain activities conducted therein, might thereafter give up those activities and that it had a right to abandon such activities with the deliberate purpose of so conducting its affairs thereafter that it could no longer be held to be doing business in that District (R. 156-157).

It may be of some significance to note that the District Court in the *Barnett* case (Goddard, *D. J.*) had dismissed the action on the ground that the defendant was not doing

business in the Southern District of New York, relying upon the decisions by this Court in *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530 (1907) and *Philadelphia & Reading Railway Company* v. *McKibbin,* 243 U. S. 264 (1917). In the Circuit Court of Appeals in the *Barnett* case, Judge Swan dissented from the opinion by the majority (consisting of Clark and Frank, *C. JJ.*) and, in dissenting, Judge Swan relied likewise upon the *Green* case and the *McKibbin* case (145 F. [2d] 800, 804). The decision in the instant case by the Circuit Court of Appeals (consisting of two of the same judges who sat in the *Barnett* case, including the dissenter in that case) was by a unanimous court whose opinion plainly reflects the change in doctrine of corporate "presence" which this Court is thought to have effected by its decision in the *International Shoe* case, decided in the interval between the decision by the Circuit Court of Appeals in the *Barnett* case and the decision by that court in the instant case (166 F. [2d] 788, 790).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

The judgments of the Circuit Court of Appeals sought to be reviewed were entered March 4, 1948 (R. 183-186). The within petition for certiorari was filed on June 4, 1948.

QUESTIONS PRESENTED

1. Does the doctrine of *International Shoe Company* v. *State of Washington,* 326 U. S. 310 (1945), for determining corporate "presence", namely, balancing the conflicting interests involved, apply to actions under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60)? [*This question was not passed upon by the District Court; it was answered in the affirmative by the Circuit Court of Appeals, but was applied in such a manner as to render it impossible ever to resolve the conflicting interests in favor of the foreign railroad corporation* (R. 178).]

2. Does the long established doctrine of this Court that a foreign corporation is subject to service of process only if it is "doing business" in a district in such a manner and to such an extent as to warrant the inference that it is "present" there, apply to a foreign railroad corporation sued under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60)? [*This question was answered in the affirmative by the District Court* (R. 157); *it was answered in the negative by the Circuit Court of Appeals* (R. 178).]

3. In ascertaining what constitutes "doing business" for the purpose of determining whether a foreign corporation is subject to service of process so as to satisfy the due process clause of the Fifth Amendment of the Federal Constitution, are considerations of *forum non conveniens* to be taken into account? [*This question was not passed upon by the District Court; it was answered in the affirmative by the Circuit Court of Appeals* (R. 177-179).]

4. Do local activities by or on behalf of a foreign railroad corporation, no matter how limited in scope, subject

that corporation to service of process under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60)? [*This question was answered in the negative by the District Court* (R. 157-158); *it was answered in the affirmative by the Circuit Court of Appeals* (R. 179-181).]

REASONS FOR ALLOWANCE OF THE WRITS

1. *The Decision by the Circuit Court of Appeals Below Is Believed to Have Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.*

In applying for the first time the doctrine of *International Shoe Company* v. *State of Washington,* 326 U. S. 310 (1945), to the instant actions under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60), the Circuit Court of Appeals below has rested its decision upon the major premise that the entire concept of corporate "presence" has been changed by this Court's decision in the *International Shoe* case; that under the doctrine of that case, corporate "presence" must be determined by balancing the conflicting interests involved; and that particularly important in determining whether the gain to the plaintiff in retaining the action outweighs the burden upon the defendant in defending far away from home, is whether the liability sought to be asserted arises out of the limited activities carried on in the forum. The minor premise of the decision by the Circuit Court of Appeals below is that under the decisions of this Court in *Baltimore & Ohio Railroad Company* v. *Kepner,* 314 U. S. 44 (1941), and *Miles* v. *Illinois Central Railroad Company,* 315 U. S. 698 (1942), once a foreign

railroad corporation is found to be "doing business" in a district so as to subject it to the jurisdiction of the courts in that district in a suit brought under the Federal Employers' Liability Act, the burden upon the defendant to defend in a forum far from the residence of the plaintiff and the witnesses and remote from the scene of the accident, is immaterial. In other words, the Circuit Court of Appeals interpreted the *International Shoe* case to mean that corporate "presence" in the constitutional sense is now to be determined by the same considerations which are employed in applying the doctrine of *forum non conveniens*. The Circuit Court of Appeals further interpreted the *Kepner* and *Miles* cases to mean that the venue amendment of 1910 (April 5, 1910, c. 143, §1, 36 Stat. 291, as amended March 3, 1911, c. 231, §291, 36 Stat. 1167; 45 U. S. C. A. §56) extending venue of suits under the Act to districts where the defendant shall be doing business at the time of the commencement of the suit, made the issue of *forum non conveniens* irrelevant in such a suit since the venue amendment conferred a federal privilege upon the injured employee to sue in any district prescribed by the section, no matter how inconvenient to the defendant. The conclusion drawn by the Circuit Court of Appeals from these hypotheses is that in a suit brought under the Act, a federal court can acquire personal jurisdiction over a foreign railroad corporation which "shall have extended its activities into the territory where that court's process runs" (R. 179), if "the local activities of the corporation have been 'continuous,' and have continued down to the time of the service of process" (R. 179-180), and the test of balancing the conflicting interests involved prescribed by the *International Shoe* case for determining corporate presence can never be applied so as to hold the foreign railroad not subject to the

service of process because considerations of *forum non conveniens,* thought to be identical with the doctrine of balancing the conflicting interests, have been eliminated from suits under the Act.

We believe that such a conclusion drawn from the premises stated in the opinion by the Circuit Court of Appeals is a complete *non sequitur.* If corporate "presence" is now to be determined by the principles of *forum non conveniens,* but such a doctrine is irrelevant in a suit brought under the Act, then the question of corporate "presence" in a Federal Employers' Liability Act case must be decided upon the basis of the doctrine long established by previous decisions of this Court, regardless of the restatement of the corporate "presence" doctrine by this Court in the *International Shoe* case. The controlling case in a suit under the Act, we believe, is still *Philadelphia & Reading Railway Company* v. *McKibbin,* 243 U. S. 264 (1917), which followed the rule of *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530 (1907).

2. *The Decisions by the Circuit Court of Appeals Below Is Believed To Be in Conflict With Applicable Decisions by This Court and With Decisions by Other Circuit Courts of Appeals.*

In the case of *Philadelphia & Reading Railway Company* v. *McKibbin,* 243 U. S. 264 (1917), which was an action brought under the Federal Employers' Liability Act (see 251 Fed. 577, 259 Fed. 476), this Court held that a foreign railroad corporation is amenable to process to enforce a personal liability against it only if that corporation is doing business within the forum in such a manner and to such an extent as to warrant the inference that it is present

there. In the *McKibbin* case this Court approved and followed the doctrine of *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530 (1907), where this Court earlier had held that solicitation of freight and passenger traffic alone was not sufficient doing of business to subject the foreign railroad corporation to the jurisdiction of the Court. Moreover the *Green* case, which never has been expressly or impliedly overruled, has stood as the law of this Court for a period of more than forty years (see list of cases cited on page 23 of accompanying Brief).

Although the Circuit Court of Appeals for the Second Circuit prior to the decision in the instant case had itself adhered to the principles for determining corporate "presence" in suits under the Federal Employers' Liability Act as laid down by such decisions of this Court as those in the *Green* and *McKibbin* cases (see *Wood* v. *Delaware & Hudson Railroad Corporation,* 63 F. (2d) 235, 236-237 (C. C. A. 2nd, 1933), the Circuit Court of Appeals below has completely departed from those principles in the instant case. In holding that the mere solicitation of business itself constituted "doing business" for the purpose of subjecting the defendant to the personal jurisdiction of the District Court (R. 181), the Circuit Court of Appeals has rendered a decision squarely in conflict with the decisions by this Court in the *Green* and *McKibbin* cases, as well as in conflict with its own decision in the *Wood* case.

Moreover, it should be noted that the Circuit Court of Appeals below, in reciting the activities of the defendant in the Southern District of New York upon which it relied in holding that the defendant was doing business there, recited the sale of coupons in New York City, not by the defendant but by other railroads (through the Consolidated

Ticket Office) whose lines originated in New York, for travel over the defendant's lines in Texas, Louisiana and Arkansas (R. 175-176). The District Court, correctly as we believe, held that such sale of coupons on behalf of the defendant in New York adds nothing to the solicitation of business by the defendant and does not require a finding that the defendant itself is doing business in New York. In support of this holding, the District Court cited (R. 158), in addition to the *McKibbin* case, the cases of *Maxfield* v. *Canadian Pacific Railway Company,* 70 F. (2d) 982 (C. C. A. 8th, 1934), cert. den. 293 U. S. 610 (1934), rehearing den. 293 U. S. 632 (1934) and *Murray* v. *Great Northern Railway Company,* 67 F. Supp. 944 (E. D. Pa. 1946). We submit therefore that the decision by the Circuit Court of Appeals below holding that the sale of coupons on behalf of the defendant in New York is to be considered in determining whether the defendant is doing business there, is in conflict with the *McKibbin* case in this Court, with the *Maxfield* case in the Circuit Court of Appeals for the Eighth Circuit and with the *Murray* case in the United States District Court for the Eastern District of Pennsylvania.

Likewise, the Circuit Court of Appeals below recited the activities of certain transfer agents, registrars and trustees of the defendant's security issues in New York City as among the activities to be weighed in determining whether the defendant was doing business in the Southern District of New York (R. 176). The District Court held, again correctly as we believe, that such fiscal activities on behalf of the defendant added nothing to the mere solicitation of business by the defendant in New York and did not constitute the doing of business by the defendant there. The District Court cited (R. 157-158) in support of its holding

on this point *Toledo Railways & Light Company* v. *Hill*, 244 U. S. 49 (1917), *Fowble* v. *Chesapeake & Ohio Railway Company*, 16 F. (2d) 504 (S. D. N. Y. 1926) and *Trizna* v. *New York, Chicago & St. Louis Railway Company*, 57 F. Supp. 484 (S. D. N. Y. 1944). We submit therefore that the holding by the Circuit Court of Appeals below, that the fiscal activities on behalf of the defendant by transfer agents, registrars and trustees of the defendant's security issues in New York are relevant in determining whether the defendant is doing business there, is in conflict with the decision by this Court in the *Toledo Railways & Light Company* case and with the decisions of the United States District Court for the Southern District of New York in the *Fowble* and *Trizna* cases.

3. *The Decision by the Circuit Court of Appeals Below Is Believed to Have Construed Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. §56) in a Manner so Novel as to Call for a Review by This Court Because of the Far Reaching Consequences of Such Statutory Construction.*

Implicit in the decision by the Circuit Court of Appeals below is the assumption that the phrase "doing business" written by Congress into Section 6 of the Federal Employers' Liability Act by the venue amendment of 1910 (April 5, 1910, c. 143, §1, 36 Stat. 291; 45 U. S. C. A. §56) constitutes a substantive definition of when personal jurisdiction may validly be acquired over a railroad corporation in a district outside the state of its incorporation. Going a step further, the Circuit Court of Appeals assumes that

the phrase "doing business" in Section 6 of the Act embraces any continuous activities of a foreign railroad in the forum irrespective of their scope or character. We believe that such an interpretation of the phrase "doing business" in Section 6 of the Act is not only contrary to the entire legislative history of the venue amendment of 1910, but also is in conflict with this Court's decision in *Philadelphia & Reading Railway Company* v. *McKibbin*, 243 U. S. 264 (1917).

This Court in *Baltimore & Ohio Railroad Company* v. *Kepner*, 314 U. S. 44 (1941), reviewed the history of the venue amendment of 1910 and held that Congress intended to give the injured employee the privilege of suing under the Act in any district where process validly could be served upon the railroad. In other words, if service was proper, the venue of the suit could not be changed because of the burden, inconvenience or expense that fell upon the carrier from the plaintiff's choice of venue. Accordingly, under Section 6, if process was validly served, the venue necessarily would be proper. As we heretofore have indicated, however, under the decisions by this Court in the *McKibbin* and *Green* cases, slight activities on behalf of a foreign railroad corporation in the forum, such as solicitation of passenger and freight traffic and nothing more, have been held not sufficient to subject such a foreign corporation to service of process under the Federal Employers' Liability Act.

The Circuit Court of Appeals in the instant case has decided the question which this Court did not decide in the *Kepner* case, namely, what is the "business" which is contemplated by the venue provisions of Section 6. In the *Kepner* case, the carrier's exhibit of the respondent's New York petition showed an allegation that it was doing busi-

ness in New York and the carrier had not moved to vacate service of process in the action in the Eastern District of New York; this Court therefore assumed that jurisdiction validly had been obtained over the carrier in that court. It followed that the venue of the suit was proper. In the instant case, the Circuit Court of Appeals has held that the doing of business contemplated by the provisions of Section 6 is any continuous corporate activity regardless of scope or substance. Applied to the facts of the case at bar, the Circuit Court of Appeals has held that "the continuous solicitation of business was itself 'doing business' under §6" (R. 181). A review by this Court of the decision by the Circuit Court of Appeals on this point is of the utmost importance, we believe, to the hundreds of railroads all over the country, large and small, who maintain small offices in numerous cities with one or two employees doing nothing but soliciting business. Under the decision by the Circuit Court of Appeals below, all such carriers are now subject to personal service of process in suits by employees under the Act, no matter how slight may be the activities carried on in the forum and though they consist of nothing more than solicitation of business. To subject a foreign corporation to the service of process on such a tenuous basis would appear to raise a serious constitutional question which has not been, but should be, reviewed by this Court.

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that writs of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit and that the duly certified copy of the transcript of the proceedings below which accompanies this petition shall be treated as though filed in response to the aforesaid writs, to the end that these causes may be reviewed and determined by this Court; that the judgments of the Circuit Court of Appeals may be reversed; and that your petitioner may be granted such other, further and different relief as this Court may deem proper.

Dated: New York, N. Y., June 4, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

JESSIE A. KILPATRICK,

Respondent.

No.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

L. M. PARKER,

Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the District Court (R. 60-66, 152-159) are reported at 72 F. Supp. 632 and 72 F. Supp. 635. The opinion of the Circuit Court of Appeals (R. 174-182) is reported at 166 F. (2d) 788.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

The judgments of the Circuit Court of Appeals sought to be reviewed were entered March 4, 1948 (R. 183-186). The within petition for certiorari was filed June 4, 1948.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the Petition at pages 2-8, *supra*. A summary of the argument is set forth in the index.

STATUTE INVOLVED

The statute involved is Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. §56) which in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred

1. In applying to the instant actions under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60) the doctrine of *International Shoe Company* v. *State of Washington,* 326 U. S. 310 (1945), for determining corporate "presence", namely, balancing the conflicting interests involved.

2. In declining to apply to the defendant, when sued as a foreign railroad corporation under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60), the long established doctrine of this Court that a foreign corporation is subject to service of process only if it is doing business in a district in such a manner and to such an extent as to warrant the inference that it is present there.

3. In holding that considerations of *forum non conveniens* are to be taken into account in ascertaining what constitutes "doing business" for the purpose of determining whether a foreign corporation is subject to service of process so as to satisfy the due process clause of the Fifth Amendment of the Federal Constitution.

4. In holding that local activities by or on behalf of a foreign railroad corporation, no matter how limited in scope, subject that corporation to service of process under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60).

ARGUMENT

POINT I

The District Court properly held that the defendant was not doing business in the Southern District of New York at the time of the commencement of the actions.

(A) *Solicitation of Business by the Defendant Within This District Does Not Render It Amenable to Process Here.*

The facts relating to the activities of the defendant in New York at the time of the commencement of the instant actions have been summarized at pages 3-6 of the Petition. This summary accurately reflects the record which was before the District Court (R. 24-32, 77-134). These facts conclusively show that the activities of the defendant in the Southern District at the time of the commencement of these actions amounted to nothing more than solicitation of traffic for transportation over its lines in Texas, Louisiana and Arkansas. Accordingly, on these facts, the decision of this Court in *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530 (1907), upon which the District Court below relied in dismissing the actions (72 F. Supp. 635, 638), is controlling and required, we respectfully submit, a decision that the defendant was not subject to the service of process attempted herein. The facts in the *Green* case, as summarized by Mr. Justice Moody (pp. 532-533), are on all fours with the facts in the instant case. The Supreme Court said that it was obvious that the defendant in the *Green* case was doing "a considerable busi-

ness of a certain kind" in the Eastern District of Pennsylvania, but held that the lower court properly had vacated service of process on the defendant's managing agent (pp. 533-534). The *Green* case never has been expressly or impliedly overruled, but it has been cited and followed by this Court in a long line of decisions:

Mechanical Appliance Company v. *Castleman*, 215 U. S. 437, 442 (1910);
St. Louis Southwestern Railway Company v. *Alexander*, 227 U. S. 218, 226 (1913);
International Harvester Company v. *Kentucky*, 234 U. S. 579, 586 (1914);
Tyler Company v. *Ludlow-Saylor Wire Company*, 236 U. S. 723, 725 (1915);
Philadelphia & Reading Railway Company v. *McKibbin*, 243 U. S. 264, 268 (1917);
People's Tobacco Company v. *American Tobacco Company*, 246 U. S. 79, 86 (1918);
Minnesota Association v. *Benn*, 261 U. S. 140, 145 (1923);
Eastman Kodak Company v. *Southern Photo Materials Company*, 273 U. S. 359, 373 (1927);
International Shoe Company v. *State of Washington*, 326 U. S. 310, 315, 318 (1945).

The rule of the *Green* case has been applied by this Court to an action brought under the Federal Employers' Liability Act in *Philadelphia & Reading Railway Company* v. *McKibbin*, 243 U. S. 264 (1917). There, Mr. Justice Brandeis recognized that the "presence" test governs in an action brought under the Act, and the Court expressly extended the rule of the *Green* case to cover such actions (243 U. S. 264, 268). The tests set forth in the

Green and *McKibbin* cases have been followed by other courts, including the Circuit Court of Appeals for the Second Circuit, in determining a corporation's amenability to service of process in a Federal Employers' Liability Act case. [See *Wood* v. *Delaware & Hudson Railroad Corporation,* 63 F. (2d) 235 (C. C. A. 2nd, 1933); *Minker* v. *Pennsylvania Railroad Company,* 63 F. Supp. 1017 (E. D. Pa. 1945); *Trizna* v. *New York, Chicago & St. Louis Railroad Company,* 57 F. Supp. 484 (S. D. N. Y. 1944); *Pickthall* v. *Anaconda Copper Mining Company,* 73 F. Supp. 694 (S. D. N. Y. 1947).]

(B) ***Sale of Coupons Within This District, Not by Defendant but by Other Railroads Whose Lines Originate in New York, for Travel Over Defendant's Lines in Texas, Louisiana and Arkansas, Does Not Render the Defendant Amenable to Process Here.***

The view expressed in *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530, 532-533 (1907), that coupons may be sold in a district for travel over the defendant's lines outside of the district, when they are not sold by the defendant but by a connecting carrier whose lines originate in the district, without subjecting the defendant to suit in that district, has been followed in several more recent cases:

Philadelphia & Reading Railway Company v. *McKibbin,* 243 U. S. 264 (1917);

Maxfield v. *Canadian Pacific Railway Company,* 70 F. (2d) 982 (C. C. A. 8th, 1934), cert. den. 293 U. S. 610 (1934), rehearing den. 293 U. S. 632 (1934);

Murray v. *Great Northern Railway Company,* 67 F. Supp. 944 (E. D. Pa. 1946).

We submit therefore that the District Court correctly held that the sale at the Consolidated Ticket Office in New York by a local railroad of a passenger ticket containing a coupon providing for transportation over the defendant's lines outside of New York did not require a finding that the defendant itself was doing business here (72 F. Supp. 635, 637, 638).

(C) *Activity of Transfer Agents, Registrars and Trustees of Defendant's Security Issues Within This District Does Not Render the Defendant Amenable to Process Here.*

The Circuit Court of Appeals held that the servicing of some of the defendant's security issues by certain New York banks, such as Chemical Bank & Trust Company, Bankers Trust Company, The New York Trust Company and J. P. Morgan & Co. Incorporated (R. 96-103), were activities to be taken into account in determining whether the defendant was doing business in the Southern District (R. 176).

The authorities heretofore have been in accord, however, that such financial activities, carried on by independent agencies, add nothing to the solicitation activities of the defendant's employees in New York and do not render the defendant amenable to process there.

Toledo Railways & Light Company v. *Hill,* 244 U. S. 49 (1917);

Fowble v. *Chesapeake & Ohio Railway Company,* 16 F. (2d) 504 (S. D. N. Y. 1926);

Trizna v. *New York, Chicago & St. Louis Railroad Company,* 57 F. Supp. 484 (S. D. N. Y. 1944);

Phillips v. *Chesapeake & Ohio Railway Company,* 257 App. Div. 942 (1st Dept. 1939).

Under the authorities above set forth, we submit that the activities of certain New York banks performing financial services for the defendant are "in no true sense the carrying on by the corporation in New York of the business which it was chartered to carry on." *Toledo Railways & Light Company* v. *Hill, supra,* at p. 53. The District Court below correctly so held (72 F. Supp. 635, 638).

POINT II

The legislative history of the 1910 amendment to the Federal Employers' Liability Act indicates the intention of Congress to follow the standards determining the validity of process laid down in the *Green* case.

This Court in *Baltimore & Ohio Railroad Company* v. *Kepner,* 314 U. S. 44, 49-50 (1941), reviewed the legislative history of the 1910 venue amendment and held that Congress intended to grant to the injured employee the privilege of suing a carrier under the Act in any district "in which the defendant shall be doing business at the time of commencing such action"; and that the privilege "cannot be frustrated by reasons of convenience or expense" (314 U. S. 44, 54).

The intent of Congress in 1910 was only to provide the injured employee with a forum in any district where process could validly be served upon the carrier. By extending venue to a district where the "defendant shall be doing business", Congress made certain that if the jurisdictional test of corporate presence was satisfied, then the carrier could not object to the venue of the suit.

When the Second Employers' Liability Act was enacted on April 22, 1908 (35 Stat. 66), it contained no provision

regulating the venue of suits brought under the Act. Venue of such suits in federal courts was thereby left to be governed by the general venue provisions of the Judicial Code, particularly Section 51 (28 U. S. C. A. §112). Under this provision, suits were required to be brought in the district whereof the defendant was an inhabitant. A statutory exception governing suits where jurisdiction was invoked only upon diversity of citizenship provided that such suits could be brought either in the district of the residence of the plaintiff or that of the defendant. The lower federal courts in 1909 and 1910 dismissed suits by railroad employees brought in courts other than the district of the incorporation of the defendant railroad where there was diversity of citizenship between the parties. The courts held that a suit under the Act was not one where jurisdiction of the court was founded *only* upon diversity of citizenship; therefore, venue could only be laid in the district whereof the defendant was an inhabitant [See *Cound* v. *Atchison, Topeka & Santa Fe Railway Company,* 173 Fed. 527 (C. C. W. D. Texas 1909); *Smith* v. *Detroit & Toledo Shore Line Railroad Company,* 175 Fed. 506 (C. C. N. D. Ohio, W. D. 1909); *Whittaker* v. *Illinois Central Railroad Co.,* 176 Fed. 130 (C. C. E. D. La. 1910)]. The result of these decisions was that an injured employee was forced to go to the district of the railroad's incorporation to bring suit in a federal court.

The injustice of such a situation was soon recognized by Congress. The question of amending the Act by providing for a specific venue provision was taken up by Congress in 1909, together with other amendments. The Senate and House Reports (S. R. 432, 61st Cong., 2d Sess.; H. R. 513, 61st Cong., 2d Sess.) deal briefly with the court decisions and the injustice of compelling injured workmen to go far from home to sue. In his special message to Congress

on January 7, 1910, President Taft said (Cong. Rec. 61st Cong., 2d Sess., Vol. 45, Part I, p. 381):

> "The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any other place than that of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law."

When the proposed amendment (H. R. 17236) was reported to the floor of the House, it provided for suit in the district of the residence of the plaintiff or defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of the action. In debate, it was recognized that this amendment would not enlarge the jurisdiction of United States courts, but would open the door to the injured employee to sue in any one of various districts where the defendant could be served (see Cong. Rec. 61st Cong., 2d Sess., Vol. 45, Part III, p. 2257).

It was when the bill was in the Senate Judiciary Committee that the amendment was proposed inserting the phrase "doing business" in lieu of "found". Senator Borah

sponsored the bill on the floor of the Senate and said that the bill enables the plaintiff "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so" (Cong. Rec. 61st Cong., 2d Sess., Vol. 45, Part IV, p. 4034 [full quotation, footnote 2, 314 U. S. 44, 59]).

The framers of the 1910 amendment, in extending the venue of suits under the Act to any district where the defendant is "doing business", must be presumed to have done so in the light of the then recent definition of "doing business" in relation to suits against railroads enunciated by this Court in *Green* v. *Chicago, Burlington & Quincy Railway Company,* 205 U. S. 530 (1907), where this Court held that though the carrier's continuous soliciting activities amounted to doing "a considerable business of a certain kind", it was not doing business "in such a manner and to such an extent as to warrant the inference that through its agents it was present there" (205 U. S. 530, 532). That the 1910 amendment incorporated into the venue term "doing business" the standards and criteria of that phrase in its jurisdictional sense is seen by this Court's approval of the *Green* case in *Philadelphia & Reading Railway Company* v. *McKibbin,* 243 U. S. 264 (1917), a case brought under the Act (see 251 Fed. 577, 259 Fed. 476).

Accordingly, on the undisputed record, the District Court was eminently correct in holding that the *Green* and *McKibbin* cases were controlling in the disposition of the instant motions.

POINT III

The application by the Circuit Court of Appeals of the *International Shoe* case to actions brought under the Federal Employers' Liability Act raises a serious question as to the uniformity of jurisdictional standards in the federal courts.

The opinion of the Circuit Court of Appeals rests in part upon the premise that the entire concept of corporate "presence" has been altered by this Court's decision in *International Shoe Company* v. *State of Washington*, 326 U. S. 310 (1945); that under the rules of that case, corporate "presence" must be determined by balancing the conflicting interests involved; and that particularly important in determining whether the gain to the plaintiff in retaining the action outweighs the burden on the defendant in defending far away from home, is whether the liability sought to be asserted arises out of the activities carried on in the forum. The other premise of the opinion below is that under the decisions of this Court in *Baltimore & Ohio Railroad Company* v. *Kepner*, 314 U. S. 44 (1941), and *Miles* v. *Illinois Central Railroad Company*, 315 U. S. 698 (1942), once a railroad does business in any jurisdiction, §6 subjects it to personal service, and the burden to defend in a forum far from the residence of the plaintiff and the witnesses, and remote from the scene of the accident, is immaterial. Having interpreted the *International Shoe* case to mean that corporate "presence" now depends upon the issue of *forum non conveniens*, the Circuit Court of Appeals interpreted the *Kepner* and *Miles* cases to mean that the venue section of the Act automatically eliminated the issue of *forum non conveniens* and subjected the rail-

road to personal service in any jurisdiction where it does business. The conclusion drawn by the Circuit Court of Appeals from these hypotheses is that in a suit brought under the Act, a Federal court may validly acquire personal jurisdiction over a foreign railroad corporation which "shall have extended its activities into the territory where that court's process runs" (R. 179), if the local activities of the corporation have been continuous down to the time of service of process.

We respectfully submit that such a conclusion is a complete *non sequitur*. If corporate "presence" is now to be determined upon the basis of principles of *forum non conveniens*, but if this doctrine is irrelevant in a suit brought under the Act, then the question of corporate "presence" in a Federal Employers' Liability Act case must be decided upon the basis of the tests previously laid down by this Court regardless of the doctrine of the *International Shoe* case. The case of *Philadelphia & Reading Railway Company* v. *McKibbin*, 243 U. S. 264 (1917), which adopts the rule of *Green* v. *Chicago, Burlington & Quincy Railway Company*, 205 U. S. 530 (1907), remains the controlling decision in this Court.

Under the doctrine of the *International Shoe* case, in determining whether it is reasonable to subject a foreign corporation to service of process, the Court must balance the conflicting interests involved; an estimate of the inconvenience which would result to the corporation from a trial away from its home or principal place of business is relevant in this connection (326 U. S. 310, 317). Another important criterion is whether the cause of action asserted arises out of or is related to the activities carried on in the forum. The Circuit Court of Appeals has held that in determining whether service of process was validly made

upon this defendant, these criteria have been eliminated by the decisions of this Court in *Baltimore & Ohio Railroad Company* v. *Kepner*, 314 U. S. 44 (1941), and *Miles* v. *Illinois Central Railroad Company*, 315 U. S. 698 (1942).

We believe that the Circuit Court of Appeals reached this conclusion because of a misinterpretation of the *Kepner* and *Miles* opinions. The Court below (R. 177) stated that these cases hold "that, once a railroad 'did business' in any jurisdiction, §6 subjected it to personal service regardless of how much inconvenience or expense was involved in trying the action far away from the scene of the accident and the residence of all the defendant's witnesses." This statement places the cart before the horse. The *Miles* and *Kepner* cases only hold that when a foreign railroad company may validly be served with process in a district where it is doing business, then §6 subjects it to trial there; and the doctrine of *forum non conveniens* may not be invoked to change the place of trial. In the *Kepner* case, this Court assumed that the defendant carrier was doing such business in the Eastern District of New York that service of process could be validly made in that jurisdiction (314 U. S. 44, 48). In the *Miles* case, the record showed that the Illinois Central operated daily trains in the jurisdiction where suit was commenced (315 U. S. 698, 701). The Court went on to point out that suits under the Act could be brought in state or Federal courts, despite the incidental burden, "where process may be obtained on a defendant, not merely soliciting business but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction" (315 U. S. 698, 702).

Obviously, the doctrine of the *Kepner* and *Miles* cases can have application only after the question of the validity of service of process has been determined adversely to

the defendant railroad. It can have nothing whatsoever to do with the foreign railroad's amenability to service of process in an *in personam* action but only requires that the carrier must defend in any district where it is "present" for the purpose of service of process.

It follows that in determining a foreign railroad's "presence" for validity of service of process under the due process clause, the tests laid down in the *International Shoe* case are just as applicable to foreign railroads sued under the Federal Employers' Liability Act, as to other foreign corporations sued upon common law causes of action.

The undisputed record shows that these plaintiffs who have suffered serious personal injuries reside in Big Spring, Texas, over 2,000 miles from New York. The defendant is a Texas corporation which operates a railroad only in Texas, Arkansas and Louisiana. Obviously, the liability sought to be asserted against this defendant in the Southern District of New York is completely unrelated to its soliciting activities there. Under these circumstances, to compel the defendant to submit to service of process would be an unreasonable requirement and a denial of due process of law under the Federal Constitution.

However, even if the "balancing of conflicting interests", in determining whether a foreign railroad should be subjected to service of process, has no place in an action under the Federal Employers' Liability Act, it certainly does not follow that "continuous solicitation of business" is "doing business under §6" (R. 181), and therefore enough to satisfy the constitutional requirements of due process of law. Such a holding is contrary to decisions of this Court cited above. Furthermore, it mistakenly assumes that the phrase "doing business" in §6 has a substantive content in relation to personal jurisdiction over a foreign railroad company.

The legislative history of the 1910 amendment to the Federal Employers' Liability Act, and the decisions of this Court, conclusively show that the phrase "doing business" is only applicable to the venue of a suit under the Act. "It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant." *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 623 (1925).

CONCLUSION

For the reasons stated in the petition and in this brief, and particularly since this case involves substantial novel questions of Federal law, vital questions of statutory construction arising under the venue section of the Federal Employers' Liability Act and conflicting doctrines for the determination of corporate presence in the constitutional sense, we urge that writs of certiorari be issued by this Court in order that the questions presented in the foregoing petition may be reviewed by this Court.

Dated: New York, N. Y., June 4, 1948.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

JESSIE A. KILPATRICK,
Respondent.

No. 73

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

L. M. PARKER,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

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July 15, 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 839

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

JESSIE A. KILPATRICK,

Respondent.

No. 840

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

L. M. PARKER,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

We desire briefly to reply to the contention which has been feebly advanced in the respondents' brief that the questions presented by the petition for certiorari are moot.

The respondents contend that since the original actions commenced by them in the Southern District of New York have been voluntarily dismissed by the plaintiffs themselves (R. 43), and since the Circuit Court of Appeals has

held that the said actions were properly dismissed by the plaintiffs (R. 181), there remains nothing further for this Court to decide and therefore the questions presented are moot. This argument is utterly without merit.

Subsequent to the commencement of the original actions, the plaintiffs commenced identical new actions (R. 48, 61). These new actions were stayed by order of the District Court pending determination of the jurisdictional issue raised in the original actions (R. 65, 135-136, 149-151). The Circuit Court of Appeals expressly held that the pendency of the second actions, in which precisely the same jurisdictional issue is involved as in the original actions, saved the appeals from the orders in the original actions from being dismissed as moot (R. 181-182). Thus, to save the expense, time and effort of further appeals to the Circuit Court of Appeals in the second actions in order to present for determination by that court precisely the same jurisdictional question as was then before that court in the original actions, the Circuit Court of Appeals refused to regard the appeals as moot and accordingly decided the jurisdictional question as presented by the record before it. We ask this Court, by means of the instant petition for certiorari, to review the same jurisdictional question and upon the same record as was before the Circuit Court of Appeals.

The following language from the opinion of the Circuit Court of Appeals shows clearly the reasoning which led it to reject the contention, now sought to be raised by the respondent herein, that the appeals were moot (R. 181-182):

> "It does not appear to us necessary to pick a footing through such a morass. It is clear that the first action should be regarded as ended by the plaintiff's notice of dismissal, and it makes no difference whether that is when we reverse the order which vacated it, or when

it was filed. All that can possibly be at stake is whether in reversing the order of dismissal, we shall be acting upon a matter that has become moot. That would be true had the plaintiff not brought the second action, which has all along remained procedurally untouched, except for the stay which is now at an end. If we should now refuse to decide the appeal from the order dismissing the action, precisely the same question would remain open as to the second action that the judge decided in the action at bar; and presumably, when the defendant moves to dismiss that action for lack of jurisdiction over the person, the judge who hears that motion will follow the first. On the ensuing appeal we should be in precisely the same position that we now are as to the order dismissing the first action; nothing would be gained, and considerable time and effort would be lost. We cannot believe that we are not free to cut our way out of such a tangle of verbiage, even though it may be literally true that the appeal from the order of dismissal becomes moot, as soon as the order of vacation is out of the way, either because we reverse it, or say that it is a nullity.

We decide the appeals as the record presents the facts. It was said at the bar that the plaintiffs had discontinued the second actions in reliance upon the defendant's assurance that it would not press the point that the summons had been served on the wrong officer. The effect of this, if true, and all questions which may be raised by facts not before us on this record, are to be understood to be open for decision in the district court. As the appeals stand in this court both orders in each of the actions will be reversed."